

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

CLIFTON PIERSON,
Plaintiff,

vs.

SHERIFF JAMES NEIL, et al.,
Defendants.

Case No. 1:19-cv-843

Barrett, J.
Litkovitz, M.J.

**REPORT AND
RECOMMENDATION**

Plaintiff, an inmate at the Hamilton County Justice Center (HCJC), brings this action under 42 U.S.C. § 1983 against defendants Sheriff James Neil, Lt. Reed, and Social Worker Mrs. Price. By separate Order issued this date, plaintiff has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. This matter is before the Court for a *sua sponte* review of the complaint to determine whether the complaint, or any portion of it, should be dismissed because it is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. *See* Prison Litigation Reform Act of 1995 § 804, 28 U.S.C. § 1915(e)(2)(B); § 805, 28 U.S.C. § 1915A(b).

In enacting the original *in forma pauperis* statute, Congress recognized that a “litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To prevent such abusive litigation, Congress has authorized federal courts to dismiss an *in forma pauperis* complaint if they are satisfied that the action is frivolous or malicious. *Id.*; *see also* 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). A complaint may be dismissed as frivolous when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke v.*

Williams, 490 U.S. 319, 328-29 (1989); *see also Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). An action has no arguable legal basis when the defendant is immune from suit or when plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or “wholly incredible.” *Denton*, 504 U.S. at 32; *Lawler*, 898 F.2d at 1199. The Court need not accept as true factual allegations that are “fantastic or delusional” in reviewing a complaint for frivolousness. *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Neitzke*, 490 U.S. at 328).

Congress also has authorized the *sua sponte* dismissal of complaints that fail to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915 (e)(2)(B)(ii) and 1915A(b)(1). A complaint filed by a *pro se* plaintiff must be “liberally construed” and “held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). By the same token, however, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hill*, 630 F.3d at 470-71 (“dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim” under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true, but need not “accept as true a legal conclusion couched as a

factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Although a complaint need not contain “detailed factual allegations,” it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557. The complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson*, 551 U.S. at 93 (citations omitted).

In the complaint, plaintiff first includes a list of ways in which he claims that prisoners are deprived of due process. Plaintiff alleges that his grievances have gone unanswered, that the law library is antiquated and inmates are only afforded twenty minutes a week of library time, that inmates are placed on lockdown when other inmates fight, that there exists “a callous disregard for our serious medical issues,” and that inmates are not permitted to watch the news because prison guards control the televisions. (Doc. 1-2, Complaint at PageID 17). Plaintiff also includes other allegations which he claims amount to cruel and unusual punishment. Plaintiff alleges that it can take weeks to see a doctor, complains about the food portions and air temperature, and claims that prison guards, including defendant Lt. Reed, use threats and profane language against them. (*Id.* at PageID 18).

For relief, plaintiff seeks monetary damages and injunctive relief. (*Id.* at PageID 19).

The complaint is subject to dismissal for failure to state a claim upon which relief may be granted.

As an initial matter, plaintiff does not include any factual allegations against defendants Neil or Price. Accordingly, the complaint should be dismissed against these defendants.

To the extent that plaintiff may seek to hold defendant Sheriff Neil or any other defendant¹ liable based on their supervisory position, it is well-settled that the doctrine of *respondeat superior* does not apply in § 1983 lawsuits to impute liability onto supervisory personnel. See, e.g., *Wingo v. Tennessee Dep't of Corr.*, 499 F. App'x 453, 455 (6th Cir. 2012) (per curiam) (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981)). “In order to find supervisory personnel liable, a plaintiff must allege that the supervisors were somehow personally involved in the unconstitutional activity of a subordinate, . . . or at least acquiesced in the alleged unconstitutional activity of a subordinate.” *Id.* (citing *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982), and *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)); see also *Colvin v. Caruso*, 605 F.3d 282, 292 (6th Cir. 2010) (quoting *Cardinal v. Metrish*, 564 F.3d 794, 803 (6th Cir. 2009)) (to succeed on claim against supervisory state prison officials, the plaintiff must show the officials “at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending officers”). Plaintiff has not alleged any facts even remotely suggested that defendant Neil directly participated in the alleged violations of plaintiff’s constitutional rights. The mere fact defendant Neil is the Sheriff of Hamilton County is not enough to impose liability on him under section 1983.

To the extent that plaintiff may intend to bring an official capacity claim against

¹ Plaintiff also alleges that defendant Reed is a supervisor. (*Id.* at PageID 18).

defendant Hamilton County Sheriff Neil, his claim is treated as a claim against Hamilton County, Ohio, the entity of which the Sheriff is an agent. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *See also Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). Plaintiff's complaint fails to state a claim for relief under § 1983 against Hamilton County because counties are not vicariously liable for the actions of their employees under § 1983. "It is firmly established that a municipality, or . . . a county, cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents." *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 441 (6th Cir. 2000) (citing *Monell*, 436 U.S. at 694). To state a claim for relief against Hamilton County for plaintiff's alleged injuries, the complaint must allege facts showing that the misconduct giving rise to plaintiff's injuries was the result of a policy, statement, regulation, decision or custom promulgated by the County. *Bright v. Gallia Cnty., Ohio*, 753 F.3d 639, 660 (6th Cir. 2014) (citing *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 556 (6th Cir. 2003)); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). *See Monell*, 436 U.S. at 694; *Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996). "The 'official policy' requirement [of *Monell*] was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in original). "[P]laintiff must adequately plead (1) that a violation of a federal right took place, (2) that the defendants acted under color of state law, and (3) that a municipality's policy or custom caused that violation to happen." *Bright*, 753 F.3d at 660 (citing *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008)). *See also Polk County v.*

Dodson, 454 U.S. 312 (1981) (municipal policy must be “moving force” behind constitutional deprivation). Plaintiff’s complaint fails to allege any facts showing that any action taken by the Hamilton County Sheriff stemmed from a particular policy, custom, or practice of Hamilton County that caused a violation of plaintiff’s civil rights.²

Plaintiff’s only allegation against a named defendant is that “supervisors, such as Lt. Reed think that cussing us out and locking us down is the solution to any and all problems.” (*Id.* at PageID 18). As noted above, plaintiff also alleges that other guards regularly “cuss us out” and threaten inmates with assault or isolation.

With respect to plaintiff’s allegations that Reed and other guards use profanity and threats against inmates, plaintiff fails to state a viable claim under § 1983, which requires a showing of a deprivation of “a right secured by the United States Constitution or a federal statute.” *See Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). It is well-settled that “[v]erbal harassment or idle threats by a state actor do not create a constitutional violation and are insufficient to support a section 1983 claim for relief.” *Wingo v. Tennessee Dep’t of Corr.*, 499 F. App’x 453, 455 (6th Cir. 2012) (per curiam) (citing *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987)); *see also Chilcott v. Erie Cnty. Domestic Relations*, 283 F. App’x 8, 11 (3rd Cir. 2008) (and Sixth, Fifth and Tenth Circuit cases cited therein). Additionally, while prison officials should not use degrading or racist language when interacting with inmates, the use of such language does not rise to the level of a constitutional violation. *See Hursey v. Anderson*, No. 16-1146, 2017 WL 3528206, at *4 (6th Cir. Mar. 31, 2017). A prison official’s use of racial

² Plaintiff does reference a policy of not permitting inmates to watch local news, however “[t]here is no constitutional right to watch television.” *Rawls v. Sundquist*, No. 96-5931, 1997 WL 211289, at *1 (6th Cir. Apr. 28, 1997) (citing *Murphy v. Walker*, 51 F.3d 714, 718 n.8 (7th Cir. 1995)).

slurs and other insults, “although unprofessional and reprehensible, does not rise to the level of constitutional magnitude” and is insufficient to support a constitutional claim for relief. *Jones Bey v. Johnson*, 248 F. App’x 675, 677–78 (6th Cir. 2007) (citing *Torres v. Oakland County*, 758 F.2d 147, 152 (6th Cir. 1985)); *see also Ivey*, 832 F.2d at 954. *Cf. Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545-46 (6th Cir. 2004).

Plaintiff’s remaining claim that defendant Reed “think[s] that . . . locking us down is the solution to any and all problems” also fails to state a claim upon which relief may be granted. (Doc. 1-2, Complaint at PageID 18). Plaintiff generally alleges that inmates are locked down following fights between other inmates for the remainder of the day or multiple days even if they had nothing to do with the fight. According to plaintiff, the lockdown amounts to cruel and unusual punishment under the Eighth Amendment and deprived him of his due process rights.³

In *Nash v. Talton*, No. 5:18-cv-175, 2019 WL 544953, at *2 (M.D. Ga. Feb. 11, 2019), the plaintiff similarly argued that prison officials violated his constitutional rights by locking down all inmates as punishment after a small group of inmates were involved in a fight. The court dismissed the plaintiff’s due process claim, finding that plaintiff failed to allege that the sanctions constituted an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The court further determined that a security measure undertaken to control a disturbance generally does not rise to the level of a constitutional violation and, in light of plaintiff’s failure to allege that the defendants imposed the lockdown in bad faith or for no legitimate purpose, that plaintiff failed to

³ Although Eighth Amendment prohibitions do not apply to pretrial detainees, the Fourteenth Amendment’s due process clause provides the same protections to detainees as the Eighth Amendment does to convicted persons. *Miller v. Calhoun Cty.*, 408 F.3d 803, 812 (6th Cir. 2005).

state a claim for relief under the Eighth Amendment. *Id.*

Plaintiff's allegations in the instant complaint similarly fail to state a claim upon which relief may be granted and should be dismissed. As in *Nash*, plaintiff includes no factual allegations suggesting that the lockdowns amounted an atypical and significant hardship that would give rise to a due process claim. *See Sandin*, 515 U.S. at 484.

Furthermore, plaintiff's allegations of occasional, brief lockdowns following inmate fights do not rise to the level of a cruel and unusual punishment under the Eighth Amendment. "Not every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987). Rather, "[t]he Eighth Amendment is concerned only with 'deprivations of essential food, medical care, or sanitation,' or 'other conditions intolerable for prison confinement.'" *Richmond v. Settles*, 450 F. App'x 448, 455–56 (6th Cir. 2011) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981)). Therefore, to establish an Eighth Amendment violation, a plaintiff must first demonstrate objectively the unique deprivation of "the minimal civilized measure of life's necessities." *Id.* at 454 (quoting *Rhodes*, 452 U.S. at 347); *see also Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000) (citing *Farmer*, 511 U.S. at 834) ("[T]he inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."). He then must subjectively show the defendant acted "wantonly," with "deliberate indifference to the plaintiff's serious needs." *Richmond*, 450 F. App'x at 455 (citing *Farmer*, 511 U.S. at 834). Because the complaint includes insufficient factual content to plausibly satisfy either the objective or subjective component, plaintiff's Eighth Amendment claim should be dismissed.

Accordingly, in sum, the undersigned finds that plaintiff's complaint fails to state a claim upon which relief may be granted. Therefore, the complaint should be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1).

IT IS THEREFORE RECOMMENDED THAT:

1. The plaintiff's complaint be **DISMISSED** with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1).

2. The Court certify pursuant to 28 U.S.C. § 1915(a)(3) that for the foregoing reasons an appeal of any Order adopting this Report and Recommendation would not be taken in good faith and therefore deny plaintiff leave to appeal *in forma pauperis*. See *McGore v. Wigglesworth*, 114 F.3d 601 (6th Cir. 1997).

Date: 11/6/19


Karen L. Litkovitz
United States Magistrate Judge

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation (“R&R”) within **FOURTEEN (14) DAYS** after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within **FOURTEEN DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).